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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In re:	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

REPLY COMMENTS OF CABLEVISION INDUSTRIES CORPORATION AND COMCAST CABLE COMMUNICATIONS, INC.

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To the Commission:

REPLY COMMENTS

Cablevision Industries Corporation and Comcast Cable Communications, Inc., by their attorneys, hereby submit their Reply Comments in response to the Commission's proposal to adopt regulations implementing Sections 12 and 19 of the Cable Consumer Protection and Competition Act of 1992 (the "Cable Act") concerning the regulation of carriage agreements and program access.[1/]

I. Complaints about Non-Vertically Integrated Programmers Only Prove that Vertical Integration is of Little Relevance in the Programming Marketplace and that Little Regulation is Warranted.

CATA complains as vehemently about the "discriminatory" practices of non-vertically integrated programmers like ESPN as it does about the practices of

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1/ Notice of Proposed Rulemaking, MM Docket No. 92-265, FCC 92-543 (adopted December 10, 1992; released December 24, 1992).

vertically integrated programmers.[2/] Moreover, strong programmers seek to impose the contract terms that CATA finds so onerous on large and small cable operators alike. The fact that both vertically and non-vertically integrated programmers attempt to impose tough provisions on cable operators of all sizes demonstrates that vertical integration is not critical to strength in the programming marketplace, and that heavy-handed regulation that singles out vertically integrated programmers is unwarranted.

II. The Commission Must Resist Calls to Ignore the Threshold Requirement of Competitive Harm Under Section 628.

Numerous parties have urged the Commission to create a per se rule that discriminatory, i.e., different, contract treatment is flatly prohibited under the Cable Act.[3/] Others have argued that any difference in rates or the mere presence of an exclusive contract should establish a prima facie violation of Section 628 and justify the filing of a complaint against a programming vendor. These readings blatantly ignore the language of both Sections 628(b) and 628(c). Section 628(b) clearly states that any finding of unlawful discrimination or exclusivity also

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2/ CATA Comments at 6.

3/ See, e.g., NRTC Comments at 13, DirecTv Comments at 12, WJB-TV Comments at 8, Cable America Comments at 14, U S West Comments at 12.

requires proof of competitive harm (that is, the activity must have had the purpose or effect of significantly hindering or preventing a multichannel video programming distributor ("MVPD") from providing programming to subscribers). Section 628(c) is designed to implement Section 628(b) and focuses on the reasonableness of a programmer's behavior. These critical elements -- proof of competitive harm and allowance of reasonable behavior -- must not be read out of the statute. Moreover, the burden of proof on these issues properly rests with the party alleging unlawful discrimination or exclusivity.

Finally, NRTC argues that, because the Cable Act explicitly grandfathers some exclusive contracts, Congress must have intended that exclusivity provisions be the only grandfathered provisions in current programming agreements.[4/] Such a suggestion is absurd. Congress has given no indication that it expects or wants the Commission to rewrite hundreds or thousands of existing contracts. On the contrary, Congressional silence on this issue compels the Commission to allow those contracts to stand and permit an orderly transition to the new rules, rather than a chaotic, uncertain one.

4/ NRTC Comments at 32.

III. Dissatisfied Distributors Ignored the Commission's Request to Consider the Cable Act's Legislative History and the Importance of Local Investment and Performance.

The most dissatisfied MVPDs refused to discuss, or even acknowledge, relevant portions of the Cable Act's legislative history, portions that stress the importance of differences in investment by local MVPDs.[5/] For example, NRTC makes little investment in distribution, in marked contrast to the enormous investment made by MSOs to distribute and market programming services to subscribers. When other MVPDs (like HSD distributors) invest comparable amounts and bring comparable benefits to programmers, they too will be able to demand rates similar to comparably sized cable operators. Alternative technologies such as HSD packagers, despite the claims of NRTC, have not stepped up to the plate in terms of investment, and simply want the benefits of high quality programming with none of the burdens of investment.

IV. The Commission Cannot Pass Prospectively on the Public Interest Qualifications of Every Exclusive Programming Contract.

Numerous parties insist that the Commission review each and every exclusive contract under a public interest analysis. Several also propose that each exclusive contract

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5/ See 138 Cong. Rec. S16,671 (daily ed., Oct. 5, 1992) (colloquy between Sen. Kerry and Sen. Inouye).

be placed on public file with the Commission, and be subject to a period of public comment or petitions to deny.[6/] There is, however, no clearer way to eliminate program exclusivity than to force Commission scrutiny of every exclusive contract under the complex "public interest" standard. Commenters proposing this form of micro-management are betting on excessive delays, expense and uncertainty to destroy what the Cable Act did not intend to eliminate. Instead of establishing elaborate review procedures, which will eliminate exclusivity as a practical matter, the Commission should establish rules that provide appropriate guidance to parties negotiating programming agreements.

Moreover, those commenters that have summarily concluded that Section 628(c) flatly prohibits exclusivity in an unserved area have ignored Section 628(b)'s mandate to increase the availability of programming to those areas. The Commission should, therefore, recognize the presumptive legality of "conditional exclusivity" in unserved areas. That is, a programmer could lawfully offer an MVPD exclusivity in an unserved area on the condition that it be the first to provide video service to the unserved area. This will hasten the arrival of video service to those

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6/ See, e.g., WCA Comments at 43; see also, DirecTv Comments at 28, Liberty Cable Comments at 17, BellSouth Comments at 9, United States Telephone Association Comments at 6 and U S West Comments at 7. Each of these commenters urges prospective approval of exclusive contracts.

currently unserved areas in which Congress intended to encourage program distribution.

V. The Commission Should Not Unnaturally Stretch the Definition of "Attributable Interest" to Include Every Form of Involvement Between a Cable Operator and a Video Programming Distributor.

Several parties have proposed extremely broad attribution rules that would sweep in virtually every major cable MSO and every programmer,[7] despite the fact that Congress made it clear that it was focusing on ownership interests.[8] The irony of these misreadings is that they will do the greatest harm to fledgling programmers struggling to sign up MSOs. Congress sought to increase programming diversity, not shackle new, independent

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7/ See, e.g., WJB-TV Comments at 8 (even if companies do not actually own a vendor, they may have the power to influence its decisions); see also, U S West Comments at 7 (a cable operator with an exclusive program agreement has an "attributable interest" in the programmer); Competitive Cable Association Comments at 6 (any top-100 MSO or any MSO with 50,000 or more subscribers nationwide should be treated as having an "attributable interest" in every programmer).

8/ "[I]t is the intent of the Committee that the FCC use the attribution criteria set forth in 47 C.F.R. Section 73.3555 (notes) or other criteria the FCC may deem appropriate." Senate Report at 78. This focus on ownership interests is consistent with the long-standing Commission attribution rules.

programmers with an additional regulatory burden when flexibility is most needed.

Respectfully submitted,

CABLEVISION INDUSTRIES CORPORATION
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February 16, 1993

CERTIFICATE OF SERVICE

This will certify that an original and nine copies of the foregoing Reply Comments were delivered by hand this 16th day of February, 1993, to the following:

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Federal Communications Commission
1919 M Street, N.W.
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Michael J. Pierce

February 16, 1993